NO. 41166-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

IN RE: PERSONAL RESTRAINT OF
AARON GREEN,
Petitioner.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Christine Pomeroy, Judge
and Honorable Paula Casey, Judge

PETITIONER'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE COURT IMPOSED AN UNLAWFUL HYDRID SENTENCE

The State argues that the court did not impose a hybrid sentence in Thurston County Cause No. 09-1-1372-5. Supplemental Response to Personal Restraint Petition at 3.

Mr. Green was sentenced on August 11, 2008 after pleading guilty to three counts of Violation of Post-Conviction No Contact Order (Domestic Violence) in Thurston County cause number 09-1-00995-7. Clerk's Papers 40-49. The court sentenced Mr. Green to 60 months under the Drug Offender Sentencing Alternative (DOSA). The first half of the sentence was to be served in the Department of Corrections, followed by 30 months to be served on community custody.

On November 13, 2009, Mr. Green pleaded guilty to one count of Felony Violation of Post-Conviction No Contact Order (Domestic Violence) in Thurston County Cause No. 09-1-01372-5. CP 17. He was sentenced on the same day to 60 months in the Department of Corrections. The court ordered the sentence to be served concurrently with Cause No. 09-1-00995-7.

The sentence is an unlawful hybrid sentence in violation of RCW 9.94A.589. Under RCW 9.94A.589, a sentence must either be concurrent with another sentence or consecutive to it. The statute does not authorize a hybrid model, where a sentence is concurrent in part and consecutive in part. *State v. Grayson,* 130 Wn. App. 782, 783, 125 P.3d 169 (2005). An unlawful hybrid sentence results where a sentence for one conviction is partially concurrent and partially consecutive to the sentence for another conviction. *State v. Smith*, 142 Wn. App. 122, 173 P.3d 973 (2007). RCW 9.94A.589(3) requires a trial court to make an "either-or" choice between a concurrent or consecutive sentence. *Grayson*, 130 Wash.App. at 785–86.

The State argues that RCW 9.94A.589(3) does not apply because Mr. Green was under sentence for a felony in Cause No. 09-1-00995-7 at the time of the commission of the offense in Cause No. 09-1-01372-5. Supp. Response at 3. The State misapprehends the thrust of Mr. Green's argument. Even if sentenced under RCW 9.94A.589(2), the sentence results in an unlawful hybrid sentence. The court ordered 60 months of continuous confinement on the second conviction, to be served concurrently with the DOSA sentence. The sentence as imposed, however, fails to anticipate the consequences of a violation of the terms of DOSA. After Mr. Green

completes the non-DOSA portion of the Cause No. 09-1-00995-7 sentence, he will serve the remaining 30 months in community custody. The DOSA "statute provides a relatively straightforward basis for qualified offenders to reduce by one-half the time they serve in prison. However, if an offender fails the DOSA program, they lose that benefit and must serve the full sentence imposed by the trial court." *In re Restraint of Taylor,* 122 Wn. App. 880, 881, 95 P.3d 790 (2004). "[U]pon revocation the former DOSA alternative sentence becomes a sentence like any other." *Taylor*, 122 Wn. App. at 883. Therefore, assuming a violation of the terms of the DOSA, under the court's order in Cause No. 09-1-01372-5, the balance of the DOSA sentence would be "tacked on" to the 60-month term. This results in a hybrid concurrent and consecutive sentence which is not permitted under *Smith* and *Grayson*.

In *Grayson,* Division 1 rejected a trial court's imposition of a hybrid sentence. The Court of Appeals held that RCW 9.94.589(3) does not authorize a part consecutive, part concurrent hybrid sentence. "Nothing in the statute suggests that the court pronouncing 'the sentence' can divide it into two parts, one part to run concurrently with the other sentences and the other consecutively." *Grayson,* 130 Wn.App. at 786.

In *State v. Smith,* 142 Wn.App. 122, 173 P.3d 973 (2007) Division 1 remanded a hybrid sentence for resentencing. *Id* at 129. There, the defendant received both Drug Offender Sentencing Alternative (DOSA) and non-DOSA sentences. The trial court ordered the in-custody portion of Smith's DOSA sentence to run concurrently with his non-DOSA sentence. But, it ordered the community custody portion of his DOSA sentence to run consecutively to the non-DOSA sentence. On appeal Smith argued the sentence was an illegal hybrid in that it imposed a consecutive 25-month term of DOSA treatment following a 43-month term of confinement for a different count. Relying on *Grayson* , the Court of Appeals agreed. The sentence was unlawful because "the community custody portions of Smith's DOSA sentences are 'tacked on' to the end of his non-DOSA sentence." *Smith*, at 128 (citing *Grayson* , at 785).

The court vacated the sentence and remanded for imposition of a non-hybrid sentence. *Smith*, at 129.

Here, the State argues that RCW 9.94A.589(2) applies because Mr. Green was under a felony sentence at the time he committed the offense changed in Cause No. 09-1-01372-5. Supp. Response at 5. Regardless of the subsection under which the sentence was imposed, the sentence runs afoul

of the reasoning of *Grayson and Smith.*

In addition, as the Court held in *State v. Murray*, 128 Wn. App. 718, 116 P.3d 1072 (2005), a trial court may not hybridize a DOSA by lessening the confinement term. *Murray*, 128 Wn. App. at 725-26. As noted in § 2, infra, the sentencing court reduced the period of confinement by ordering the sentences be run concurrently and finding the basis for an exceptional sentence.

2. THE EXCEPTIONAL SENTENCE IS NOT SUPPORTED BY A VALID OR RECOGNIZED MITIGATING FACTOR

Mr. Green was given an exceptional sentence, permitting the court to order a concurrent sentence under RCW 9.94A.589(2). In imposing the concurrent sentence, the court noted that it was ordering an exceptional sentence below the standard range. Report of Proceedings [RP] (November 13, 2009) at 13-14. In support of the concurrent sentence, the court found as the sole factor supporting the sentence was that "the defendant and state stipulate that justice is best served by the imposition of the exceptional sentence below the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act." CP 17.

The State noted in its Supplemental Response that the factor is actually an aggravating factor, not a mitigating factor. Supp. Response at 7-8. The State argues, however, that the list of mitigating factors in RCW 9.94A.535 is not exclusive. Supp. Response at 8. However, the trial court's reason for imposing an exceptional sentence does not justify a sentence below the presumptive range. The judge did not cite a specific ground for a departure, but instead made it clear that she was willing to grant the exceptional sentence requested by the State and the defendant. RP (November 13, 2009) at 12. The court stated: "I can word it so that whatever sentence he got, I would give concurrent, but it would be 60 months, and I would do it concurrent." RP (November 13, 2009) at 13-14. The court cited no specifics for the departure other than court's acquiescence to the agreed recommendation, apparently based on the belief that the presumptive range was too long. RP (November 13, 2009) at 7-8. This agreement appears to be based in part on the fact that the protected party is pregnant with Mr. Green's child, that they have other children together, and requested that the no contact order be vacated. RP (November 13, 2009) at 10. However, a trial court's subjective conclusion that the presumptive range does not adequately address rehabilitative concerns or the personal characteristics of

the offender is not a substantial and compelling reason justifying a departure. *State v. Allert,* 117 Wash.2d 156, 169, 815 P.2d 752 (1991); *State v. Pascal,* 108 Wash.2d 125, 137-38, 736 P.2d 1065 (1987). Neither addictions nor other personal circumstances of defendants have been found to support exceptional sentences downward. *See, e.g.,*; *State v. Freitag,* 127 Wash.2d 141, 145, 896 P.2d 1254, 905 P.2d 355 (1995) (the defendant's desire to improve through community service); *State v. Estrella,* 115 Wash.2d 350, 353-54, 798 P.2d 289 (1990) (willingness to obtain treatment and attempts to gain employment); *State v. Amo,* 76 Wash.App. 129, 133, 882 P.2d 1188 (1994) (potential loss of parental rights); *State v. Hodges,* 70 Wash.App. 621, 623, 855 P.2d 291 (1993) ("extraordinary community support" and efforts at self-improvement).

Here, the trial court's reason for imposing an exceptional sentence does not present a substantial or compelling reason to depart from the presumptive range.

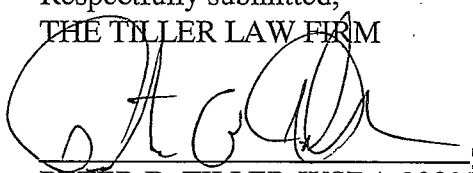
B. CONCLUSION

The sentence in Cause No. 09-1-1372-5 resulted in an illegal hybrid sentence. If a sentence is illegal, a court has the power and duty to correct it. *State v. Smissaert,* 103 Wash.2d 636, 639, 694 P.2d 654 (1985).

For the reasons set forth above, and as set forth in his Supplemental Brief, Mr. Green respectfully requests that this Court grant his requested relief.

DATED: September 22, 2011.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE

I certify that I hand delivered a copy of the foregoing Reply Brief of Petitioner to the Court of Appeals and mailed a copy to the Carol LaVerne and the Appellant, postage pre-paid on September 22, 2011, at the Centralia, Washington post office addressed as follows:

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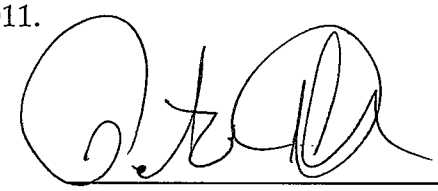

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